IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE JURISDICTION

CRIMINAL APPEAL NO.550 OF 1997

Shivaji Rajaram Kumbhar
Age 56 years,
residing at : Neelam Nagar,
Plot No.15, Solapur ....Appellant.

V/s

The State of Maharashtra ...Respondent.

Mr R.S. kate, advocate for the appellant.
Mr. A.S. Shitole, APP for the State.
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CORAM : V.G.PALSHIKAR & R.C.CHAVAN, JJ
DATED : 9TH AUGUST, 2005

ORAL JUDGMENT : (Per R.C.Chavan, J)

1. Being aggrieved by his conviction for murder of his nephew and sentence of imprisonment for life and fine imposed for offence punishable under section 302 of the Penal Code, the accused in Sessions Case No. 144 of 1996 before the Sessions Judge, Solapur has preferred this appeal.

2. Facts which led to prosecution of the appellants are as under:-

. Appellant's sister Rakhamabai is married to Dashrath, father of the deceased. Deceased behaved

indecently with daughter and daughter-in-law of the accused, leading to strained relations. On the night of 21/3/1996 when the victim was sleeping in courtyard of his house, accused stabbed the victim. Victim started crying. His parents and others reached the spot. Victim's mother snatched knife from the accused and handed it over to her husband. Victim was taken to hospital and offence was registered on the basis of the statement made by the deceased to Head Constable Londe. Victim died the next morning.

3. After performing inquest, the dead body was sent for post-mortem examination. Police recorded statement of witnesses, seized incriminating articles, sent the incriminating articles to Forensic Science Laboratory and, on completion of investigation, sent the charge-sheet to Judicial Magistrate, First Class Solapur.

4. The learned Judicial Magistrate committed the case to the Court of Sessions on finding that the accused had committed an offence triable exclusively by the Court of Sessions. The learned Sessions Judge, Solapur charged the appellant of offence punishable under section 302 of the Penal Code. Accused pleaded not guilty and claimed to be tried. In its attempt to bring home the guilt of the accused, prosecution

examined in all 10 witnesses. Upon consideration of evidence of these witnesses, in light of arguments advanced, the learned Sessions Judge held the appellant guilty of murder and convicted and sentenced him to suffer imprisonment for life and fine of Rs 2,000/-. Aggrieved thereby, the appellant has preferred this appeal.

5. We have heard the learned advocate Shri Kate for the appellant and Shri Shitole, the learned Additional Public Prosecutor for the State. We have gone through the entire evidence with the help of both the learned Counsel in order to examine the correctness of conclusions drawn by the learned Sessions Judge.

6. The learned Counsel for the appellants pointed out that out of 10 witnesses examined, six have turned hostile and not supported the prosecution. Out of remaining 4, P.W.7 - Dr. Chinchore treated the patient and also certified the fitness of the patient to make a dying declaration. P.W. 8 - Dr. Ghatole conducted post-mortem examination. There is no doubt that the victim died of injury to his liver which was inflicted in homicidal attack, as observed by Dr. Ghatole in notes of post-mortem examination at Exhibit-28. The question is only about authorship of these injuries.

7. P.W. 6 - Head Constable - Namdeo Londe recorded dying declaration at Exhibit-22 after P.W.7 Dr. Chinchore had certified the victim to be fit to make statement. In this dying declaration, the victim stated that when he was sleeping in courtyard of his house, accused - Shivaji Kumbhar woke him up and after the victim woke up, stabbed the victim with a knife in his abdomen. He raised cries attracting his parents etc.

8. The other witness who has supported the prosecution is P.W. 9 - Investigating Officer API Maruti Bandgar. API Bandgar stated about the recovery of a knife at the instance of accused vide Exhibits 32/33. However, panch P.W. 10 - Nagayya Swami in whose presence P.W.9 - API Bandgar had interrogated the accused, turned hostile. The memorandum and panchanama whereby knife was discovered have not been signed by the accused. In any case, this memorandum and panchanama lose all their value if one recalls the suggestions made by the prosecution to P.W.5 - Rakhamabai, the victim's mother that she had snatched a knife from the accused and handed it over to her husband P.W. 4 - Dashrath. Rakhamabai had allegedly made such statement before the police, the relevant portion whereof was contradicted by Rakhamabai and was

duly proved by the Investigating Officer at Exhibit-38. Thus, if the prosecution story is that the weapon of assault was snatched by Rakhamabai, there is no question of its discovery at the instance of accused in the course of investigation. Therefore, this part of evidence has to be rejected as concocted.

9. The disclosure made to P.W.6 - Head Constable Londe at Exhibit-22 by the victim is far outweighed by the account given by P.W. 1 - Bharat, P.W. 2 Balu and P.W. 3 - Prakash who state that they were the first few to whom the victim met after incident. They took the victim to MIDC Police Station. These witnesses denied that the victim told them that the appellant had stabbed the victim.

10. P.w. 4 - Dashrath Kumbhar, victim's father and P.W. 5 - Rakhamabai, victim's mother also do not support the story of any disclosure by the victim that the appellant was the assailant. On the other hand, both the parents of victim are categorical that the victim did not name the assailant. There is no reason for parents of the victim to depose falsely howsoever close may be the relation of P.W. 5 - Rakhamabai with the appellant, because their relation with their son will be closer still.

11. In view of this, we conclude that the learned Sessions Judge was in error in convicting the appellant of murder on the basis of sole statement made to P.W.6 - Head Constable Londe, since the victim did not make any such disclosure to his parents or neighbours who met him immediately after the incident.

12. We, therefore, allow the appeal and set aside the conviction of the appellant for offence punishable under section 302 of the Penal Code and the resultant sentence imposed upon him. Bail bond, if any, furnished by the appellant shall stand cancelled and fine, if paid, shall be refunded.

(V.G. PALSHIKAR, J.)

(R.C. CHAVAN, J.)